

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0071012381:

MITCHELL REINHARDT, ) Case No. 748-2008  
)  
Charging Party, )  
)  
vs. ) **HEARING OFFICER DECISION**  
) **AND NOTICE OF ISSUANCE OF**  
BNSF RAILWAY COMPANY, ) **ADMINISTRATIVE DECISION**  
)  
Respondent. )

\* \* \* \* \*

**I. PROCEDURE AND PRELIMINARY MATTERS**

Mitchell Reinhardt filed a complaint with the Department of Labor and Industry on April 5, 2007, and an amended complaint on September 7, 2007, alleging that BNSF Railway Company (BNSF), his former employer, discriminated against him in employment in because of age and disability. On November 2, 2007, the department issued notice that Hearing Officer Terry Spear would preside over the contested case hearing on the complaint.

The hearing proceeded on August 3-4, 2009, in Billings, Montana. Reinhardt attended with his counsel Peter Michael Meloy, Meloy Law Firm. BNSF attended through its designated representative, Dan Dassinger, with its counsel, Michelle T. Friend, Hedger Friend, PLLC.

Dan Dassinger, charging party Mitchell Reinhardt, Michael Woodward, Allen Konkilya, Keith Clingingsmith, Pete Score, Dr. Michael Gerrard and Don Kautzmann testified. BNSF submitted the depositions of Steve Ballentine, James Knoll, Dr. Mary Gaddy, Dr. Steven Base and Ty Dufner, which were admitted into the record without objection. Exhibits 1-5, 7-16, 19-25, 29, 32, 35, 37, 39, 104-106, 111, 113, 118-123 and page 18 of BNSF's Answers and Responses to Reinhardt's First Discovery Requests were admitted into the record. Exhibits 18 and 129 were offered and refused.

The Hearings Bureau received the last post hearing filing on October 19, 2009. The Hearings Bureau file docket accompanies this decision.

**II. ISSUES**

The dispositive issue is whether BNSF discharged Reinhardt because of age and disability. The final prehearing order contains a complete issue statement.

### III. FINDINGS OF FACT

1. Charging Party Mitchell Reinhardt (date of birth 9/7/1958) first applied for an appointment as a conductor with BNSF Railway Company (BNSF) in 2005, having concluded that the railroad was hiring “older” people. Reinhardt was initially selected for a conductor trainee position in Glendive, but did not pass the Industrial Physical Capability Screening (IPCS) test due to a left shoulder deficiency.

2. In 2005, BNSF indicated that graduates of the National Association of Railway Schools (NARS) program would be given preferences for positions with the railroad. After he initially failed the IPCS test, Reinhardt attended and completed a six-week NARS training course, obtaining his NARS certificate. Reinhardt also reconditioned himself, worked with BNSF to retake the IPCS test, and passed it on August 19, 2005. He again applied but was not selected for conductor training.

3. In July 2006, Reinhardt again applied for Glendive and Forsyth conductor trainee positions, and was invited to the hiring session in Glendive. He completed an application for employment, including his resume, completed BNSF’s medical history questionnaire and again took the IPCS test. On or about August 5, 2006, BNSF’s Medical Department notified Reinhardt that he met the medical standards for the position of conductor trainee. Accepted for a conductor trainee position, Reinhardt began working for BNSF on August 28, 2006. His training coordinator was Daniel Dassinger and his immediate supervisor was Trainmaster Don Kautzmann.

4. BNSF is a railroad operating in 28 states, including Montana, and two Canadian Provinces. It employs approximately 36,000 people. BNSF maintains a division headquarters at Billings, Montana.

5. The job of a BNSF conductor requires many key skills and abilities, including coupling air hoses, which provide pneumatics for the braking system on trains. Coupling involves bending down and reaching in between cars for the air hoses, then grasping, pulling and twisting to connect them.

6. BNSF trains can be up to two miles long. The conductor job requires performing train and equipment inspections. The inspections require proficiently walking the train to identify any unsafe conditions or mechanical defects, down one side of the train and then back up the other on uneven terrain and ballast, which stretches for more than a mile at a time. Inspections and other train work also require climbing on and off equipment by lifting one foot approximately three feet onto a ladder while reaching up to grasp the grab irons with both hands and pulling one’s weight up onto the ladder.

7. Conductors must also ride on moving cars while holding onto a ladder,

sometimes for an extended period of time. Thus, the job also requires the ability to maintain balance while working on and around moving equipment, including getting on and off cars on uneven terrain and ballast. Conductors must operate switches, which involves bending down over the switch and reaching and being able to exert muscular strength sufficient to push and pull the lever. Conductors must be able to make quick hand and leg movements.

8. Due to the nature of the position (working around moving and heavy equipment), it is imperative that crew members, including conductors, are aware of their environment and are able to react and respond quickly to any condition needing attention. In addition, if there is a broken “knuckle” (coupler connecting two cars) when the train is outside of a terminal, the conductor must replace it, lifting and carrying a replacement “knuckle,” which weighs up to 83 pounds.

9. Pursuant to the collective bargaining agreement (CBA) between BNSF and the United Transportation Union, conductor training consists of a one week orientation, followed by three weeks of on-the-job training, three weeks of classroom instruction and then another eight weeks of on-the-job training. At the conclusion of this training, successful trainees are given a promotion examination. Employees who pass the exam become conductors. Employees who failed the examination are scheduled for up to an additional four weeks of either classroom or on the job training, then given a second test. Upon passage of that second test, they become conductors. Upon failure, they forfeit all seniority and employment rights. BNSF has the right to “disapprove an application for employment” (in other words, discharge the probationary employee) within 60 calendar days beyond the initial three weeks of classroom training, not just at the conclusion of the training process.

10. Under Section 5 of the CBA Memo of Understanding, for an employee who is unable to complete training due to a bona fide illness or injury, BNSF is obligated to extend the training period for the period of unavailability, for up to eight months.

11. As part of the training program, the training coordinator serves as a “mother hen,” helping trainees with problems, answering questions and shepherding them through the training process. The training coordinator must anticipate problems during training and fashion solutions.

12. The training coordinator fills out a check list during the first week of training to assure that each new employee can properly perform the tasks of conductor. Evaluation of the employee’s on-the-job training is performed by “craft instructors.” In practice, an employee is evaluated on each trip by a conductor. These evaluations are normally provided on a form filled out by the supervising

conductor and given to the training coordinator at the end of each trip. Other employees who may observe the trainee at work (such as other crew members) can also submit evaluations or comments. Classroom work is evaluated by testing done by the classroom administrators.

13. Over the history of railroading in America, an unusual aspect of training for new hires has evolved – the use of union employees (craft instructors) rather than management for much of the training. To some extent, this distances management from some of the actual training and evaluation of new hires, requiring management to rely to a greater extent upon the feedback of the seasoned union employees who train and observe the trainees.

14. Don Dassinger was the BNSF training coordinator during Reinhardt's tenure with the railroad. He evaluated Reinhardt's orientation week, which Reinhardt successfully completed. Dassinger filled out an evaluation form for Reinhardt, which was not produced in this case. *See, infra*, Finding 36, p. 8, footnote 2.

15. In early September 2006, Reinhardt began his initial three-week on-the-job training, which he successfully completed. During that on-the-job training, Dassinger observed Reinhardt in the field, learning to work on and around the railroad cars, on a few occasions. On one of those occasions, the trainees individually climbed a ladder on a grain car and practiced performing their hand signals while on the ladder. Dassinger commented that Reinhardt, while signaling from the ladder, was not adequately signaling. He asked Reinhardt if he was "scared," to which Reinhardt replied that he was "nervous" and had been up on the car "a long time."

16. For new trainees to be nervous working around railroad cars and equipment is not at all unusual. Familiarizing new hires with the working environment, so they can learn to react promptly and properly, is a goal of training.

17. After completion of the initial on-the-job training weeks, classroom training followed in weeks five, six and seven (September 25 through October 13, 2006). Reinhardt successfully completed this classroom training.

18. On October 16, 2006, Reinhardt began the additional eight weeks of field work. He was now at the point in his training where he began working on moving trains, observed by the other crew members (particularly but not exclusively the conductors) that he accompanied on particular assignments, whether "trips" on a train out on the road or more local work, such as switching cars in the yard or helper service (on a unit or units assisting in pushing other trains).

19. Keith Clingsmith is a conductor who, as of the time of hearing, served

as Training Coordinator, as Dassinger's successor. Clingingsmith has worked for BNSF as a brakeman and conductor since 1976. On October 21, 2006, Reinhardt accompanied Clingingsmith, the conductor, on a helper service assignment. Afterwards, Clingingsmith filled out an evaluation form for Reinhardt in which all but three of the 22 categories assessed were marked good or fair. However, Clingingsmith, along with engineer, Al Koncilya, reported both to Dassinger and to Glendive trainmaster Don Kautzmann that Reinhardt was not "walking stable." In attempting to describe the problem that he observed, Clingingsmith opined that Reinhardt might have a health issue, which he described as "a stroke."

20. Clingingsmith requested that he work with Reinhardt on more than one trip because of his concern about Reinhardt's ability to perform the physical requirements of the job. In addition to his observations about Reinhardt's uncertain balance while working in or around moving equipment, uneven terrain and ballast, Clingingsmith had doubts about Reinhardt's ability to throw switches and to couple the engine and air hoses, also essential requirements of the job. His concerns involved performance, but also the safety of Reinhardt or others. He observed Reinhardt walking with difficulty toward switches and exhibiting confusion about switching activities.

21. Clingingsmith also recommended that Reinhardt be placed with another veteran conductor. Knowing that Reinhardt had obtained a NARS certificate, Clingingsmith discussed with Dassinger calling to verify Reinhardt's NARS training performance. Despite his predominantly "good" or "fair" scoring on his written evaluation, Clingingsmith reported that Reinhardt was "poor" on his understanding of track warrants and documents, his identification of switches, and his overall understanding concerning his responsibility and key requirements. Clingingsmith noted that Reinhardt needed help with overall field work.

22. Al Koncilya is a locomotive engineer for BNSF, who has worked for 33 years as an engineer and brakeman. He worked with Reinhardt and Clingingsmith on the same helper service assignment in Glendive. When separating the helper engine from the train, he, like Clingingsmith, observed Reinhardt was not "walking stable." Immediately after finishing the shift, he also made an oral report to Kautzmann, out of concern about Reinhardt's mobility. Koncilya's concern was that he, as an engineer, could be working in the future with just Reinhardt, as a conductor, and did not want him falling under the engine. He also questioned whether Reinhardt could get out of harm's way quickly, when and if that was necessary.

23. Reinhardt's next assignment, on October 25, 2006, was with conductor John Wilson. Wilson evaluated Reinhardt's performance as "good" in every category. Wilson, with a seniority date of January 16, 2006, had far less experience than many

other union employees who worked with and evaluated Reinhardt.

24. Pete Score is an engineer for BNSF, who has worked as a brakeman, conductor and engineer since 1989. He worked with Reinhardt between four and seven times on runs between Glendive and Forsyth. Score observed Reinhardt having inordinate difficulty walking and keeping his balance while on ballast and getting on and off the locomotive. He was concerned that Reinhardt was going to get hurt. During the time that Score worked with Reinhardt, he reported his concerns to Dassinger.

25. On October 30, 2006, Dassinger assigned Reinhardt to work in the switch yard. While this was not unusual, it consisted of duties not assigned to others in Reinhardt's class. Switch yard duty involved 12-hour days in which the employees spent most of the time on their feet climbing in and out and trains and rail cars.

26. Reinhardt worked his switch yard shifts with two conductors – Jim Knoll and Steve Ballentine. Knoll worked with Reinhardt on yard switcher duty from approximately October 30 to November 2, 2006. Knoll has worked for BNSF as a conductor and brakeman since 1974. He has trained 75 to 80 new hires during his entire railroad career.

27. Kautzmann and Dassinger felt that they should assign Reinhardt work with more older, experienced workers, preferably with some of their better craft instructors. Knoll was one such worker. He had been in the yard for years and had trained many new hires. He had filled out evaluation forms for 10 years – if a trainee did not provide an evaluation form, Knoll would report his observations orally.

28. Knoll turned in an evaluation of Reinhardt, dated November 3, 2006, to Dassinger and Kautzmann, and also discussed his evaluation with Kautzmann. Out of 35 categories in which he evaluated Reinhardt, Knoll gave him four “good” ratings, 21 “fair” ratings and 10 ratings worse than “fair.” He rated Reinhardt “poor” in safe, alert and efficient job performance around equipment; proper radio procedure; working with end of train devices (ETD); understanding switch lists, track lists and work orders; understanding and identifying hazards at industries; understanding basic switching moves; aligning drawbars; setting out/picking up efficiently and properly; inspecting cars and brake tests; remaining safe and alert while working on or around equipment; and in Reinhardt's overall understanding concerning a conductor's responsibility and skill requirements. He and Ballentine also noted Reinhardt's difficulty coupling hoses.

29. Knoll appended a “note” to his evaluation, expressing his feeling that Reinhardt “does not have the physical capability to do the job [and] seems very unstable walking along the tracks and . . . on moving equipment.” Reinhardt's

performance of his duties “scared” Knoll. Knoll had never before reported feeling that a trainee could not physically perform the job nor written a similar “note.”

30. Ballentine, who worked on the yard switcher crew with Knoll and Reinhardt, had been employed by BNSF as a conductor or brakeman since 1976, and had trained approximately 20 conductor trainees since 1992. Like Knoll, Ballentine would either fill out reports on progress or provide an oral report to the training coordinator and/or the trainmaster. Ballentine also observed Reinhardt having difficulty coupling air hoses, showing insecurity on equipment, and having difficulty walking on ballast. Ballentine had conversations with Dassinger (before Reinhardt’s eventual dismissal) in which he expressed his safety concerns regarding Reinhardt. Reinhardt was the first trainee that Ballentine had felt this strongly about reporting as a safety risk. Dassinger told him to put it in writing when he got time. Ballentine filled out an evaluation, dated November 14, 2006, and submitted it, not knowing that BNSF had already dismissed Reinhardt.

31. A huge training concern is making sure that trainees are capable of doing every aspect of the job – that they are not going to get hurt or get someone else hurt. Dassinger routinely tracked the progress of new hires through evaluations completed by union employees (craft instructors). The initial evaluations indicating that Reinhardt had a slow pace and seemed nervous were not determinative of Reinhardt’s future employment. However, the continued reports of performance problems and safety concerns did become crucial for Reinhardt’s future with BNSF.

32. Knoll’s evaluation and note, as well as Knoll and Ballentine’s oral reports, raised a question for Kautzmann about whether Reinhardt could safely work as a conductor. Kautzmann talked with Tom Lowe, his supervisor, and also with Mike Woodard, BNSF’s Human Resource Officer at the time, about his concerns and about the reports that he was getting from other employees. Kautzmann told Woodard that he might have to let Reinhardt go. Kautzmann mentioned “stroke” and “too old” comments made in some of the oral and written reports, as descriptions of what craft instructors had observed. Woodard responded that Reinhardt had successfully completed the NARS program and was deemed medically qualified. Woodward also pointedly stated that Kautzmann was not a medical expert and that the BNSF did not choose employees based on their ages. He told Kautzmann that the proper procedure would be to let Reinhardt proceed through the training program and see how he did. He also told Kautzmann that any decision to terminate Reinhardt had to be on the basis of documented test results or performance issues.

33. Reinhardt knew that he had difficulty connecting air hoses while working the yard switching job at the end of October and first few days of November. He was having problems with his legs (weakness and difficulty with coordination),

particularly on long or busy shifts. He had experienced difficulty keeping up with Knoll and Ballentine. He knew that they made complaints about his performance. He knew he had not been able to keep up the pace of getting up and down engines and coupling trains. He did not report any of the problems he was having with his legs to BNSF.

34. On or about November 6, 2006, Dassinger told Reinhardt that he was “unhappy” with him, that the switch crew had not been happy with him, and that there were complaints about his work. Dassinger told Reinhardt that he would be getting one more chance, on the local freight to Hettinger. During this conversation, Dassinger told Reinhardt that “maybe he was too old for the job.” Dassinger also told Reinhardt that he would be watched closely so he should do the best he could. Reinhardt responded with a denial that he was having any problems. After this conversation, Reinhardt knew or should reasonably have known that BNSF was considering “disapproving his application for employment” (in other words, discharging him while he was still a probationary employee).

35. Dassinger wanted to send Reinhardt out on another run where there was air hose switching. He had even made two calls to NARS to find out more about Reinhardt’s performance and to see if they had information that he could use to help Reinhardt get through the BNSF training program. He assigned Reinhardt, with Jason Ackerman as the conductor, to the Hettinger trip on November 7, 2006 (an “over and back” run, returning on November 8, 2006). Reinhardt completed that assignment, and felt that he had performed satisfactorily, with no problems.<sup>1</sup>

36. By this time, Dassinger and Kautzmann had talked five or six times about Reinhardt’s performance. Kautzmann may also have seen some of the evaluations. Dassinger made him generally aware of the written and oral reports and complaints about Reinhardt, and Kautzmann had heard some of the oral reports and complaints himself. Dassinger also reported (to Woodard as well as to Kautzmann) that there were many (“30-40”) good evaluations of Reinhardt.<sup>2</sup> Kautzmann as well as Dassinger had enough experience to know that some “bad” evaluations would be normal at the commencement of field work. The gravity of the reported concerns about Reinhardt’s performance were extraordinary.

37. Without talking to Woodard again or waiting to find out from Dassinger

---

<sup>1</sup> Ackerman would submit a “bad” written report of Reinhardt’s performance on the Hettinger run, which BNSF sought and obtained after discharging Reinhardt. *See, infra*, Finding No. 40, p. 9.

<sup>2</sup> At hearing, Dassinger testified that he had overstated the number of good evaluations, which could not have been more than 23, based upon the number of assignments Reinhardt worked. The question of numbers of good versus bad evaluations arose because BNSF produced virtually none of the good evaluations. BNSF witnesses testified that they could not find most of the evaluations.

or Ackerman how the Hettinger trip had gone, Kautzmann had another conversation with his supervisor, Tom Lowe. They decided to end Reinhardt's employment. On November 9, 2006, Kautzmann prepared a termination letter for Lowe's signature. Reinhardt had worked almost half of the 60 calendar days beyond initial classroom training during which BNSF, under the CBA, could fire a probationary employee.

38. On November 10, 2006, Kautzmann called Reinhardt into his office and, in Dassinger's presence, told him that BNSF had concerns about his physical capacity to perform his job duties and that for safety's sake they were terminating his employment. BNSF terminated Reinhardt's employment because of concerns from operating employees in the field that Reinhardt was not capable of safely performing his job in the field and could place himself and others in harm's way. It did not terminate his employment because of age or perceived disability.

39. Dassinger was surprised that the decision had already been made and was being implemented on November 10, 2006. Based upon the evaluations, complaints and reports he had received, and his conversations with Kautzmann about Reinhardt, he expected Reinhardt to be discharged, just not quite so soon.

40. On November 12, 2006, Dassinger sent an email to BNSF personnel, including Woodard, advising them that Reinhardt had been terminated. When Woodard received the email, he called and asked Dassinger why Reinhardt had been fired and requested documentation related to performance deficiencies from Dassinger. On November 13-14, 2006, Dassinger collected bad evaluations of Reinhardt, consisting of three evaluations done in September, Knoll's evaluation and note and the evaluations from Ackerman and Ballentine, both of which had been dated and submitted after Reinhardt's discharge. As already noted, Ballentine had voiced his concerns to BNSF before the discharge decision was made.

41. Woodard questioned the decision to terminate Reinhardt's employment. He was worried about the adequacy of the documentation. He felt that descriptions of the problems Reinhardt seemed to have at work in terms such as "old" and "too old," as well as by reference to a medical condition<sup>3</sup>, were inappropriate. Woodard's main concern was whether the existing documentation would justify the firing in any subsequent litigation.

42. The CBA's provision for additional time and a second test, for a

---

<sup>3</sup> For example, Tr. p. 295, lines 19-23: "[H]ave you ever seen somebody that had a stroke or had recovered from a stroke?" And I think we said, 'Yeah,' we both, you know, knew. And I said, 'And to me that seems like where we're at here.'" Clingingsmith, reading his deposition testimony at hearing about the conversation he had with Koncilya, the engineer, describing their observations and concerns about Reinhardt [interior quotation marks added.]

probationary employee who completes training but fails the promotion exam, does not apply to probationary employees discharged before completing their training.

43. The CBA's provision for additional time to complete training, for a probationary employee who has a bona fide medical illness or injury during training, does not apply to probationary employees who neither report nor otherwise assert the occurrence of a bona fide medical illness or injury during training.

44. After BNSF dismissed him, Reinhardt sought treatment from Ty Dufner, P.T., regarding his problems with his legs. He had subsequent medical evaluation and treatment for those and other problems with his upper as well as his lower extremities. His reports to the medical professionals about the onset and severity of those problems are too vague to make any findings about whether any of these problems manifested while he worked for BNSF and caused or contributed to his performance difficulties as a conductor trainee. The evidence adduced regarding post termination medical evaluations and treatment of Reinhardt does not support any findings that Reinhardt suffered from any defined medical problem that caused his difficulties safely performing the required physical activities necessitated by essential conductor job duties.

#### IV. DISCUSSION<sup>4</sup>

Reinhardt presented two different charges of discrimination in employment – age discrimination and disability discrimination. Mont. Code Ann. § 49-2-303(a) provides in, pertinent parts, that it is an unlawful discriminatory practice for an employer “to discriminate against a person . . . in a term, condition, or privilege of employment because of . . . age [or] physical or mental disability.”

The department follows the Montana Rules of Evidence in making contested case fact determinations. “Notice of Hearing,” November 2, 2007, p. 2; *also see* Admin. R. Mont. 24.8.704 and 24.8.746. Applying those Rules, the evidentiary framework for department discrimination cases is the same as that applicable in district court civil trials. The burden of producing evidence is initially upon the party who would lose if neither side produced any evidence; thereafter, the burden of producing evidence shifts to the party against whom a finding would issue if no further evidence was produced. Mont. Code Ann. §26-1-401. In discrimination cases, as in most civil cases, the ultimate burden of persuasion always rests upon the party advancing the particular claim or defense. *E.g.*, Mont. Code Ann. §26-1-401; *Heiat v. Eastern Montana College* (1996), 275 Mont. 322, 912 P.2d 787, 791, *citing Texas Dept. of Comm. Affairs v. Burdine*, (1981), 450 U.S. 248, 253;

---

<sup>4</sup> Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Hoffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

*Taliaferro v. State* (1988), 235 Mont. 23, 764 P.2d 860, 862; *Crockett v. Billings* (1988), 234 Mont. 87, 761 P.2d 813, 818.

In civil cases, a preponderance of the evidence – enough to persuade the fact finder about what is more likely than not true – is sufficient to establish the truth of any fact at issue. Mont. Code Ann. §26-1-403(1). When the record contains conflicting evidence of what is true, the fact finder decides the credibility and weight of the evidence. *Stewart v. Fisher* (1989), 235 Mont. 432, 767 P.2d 1321, 1323; *Wheeler v. City of Bozeman* (1989), 232 Mont. 433, 757 P.2d 345, 347; *Anderson v. Jacqueth* (1983), 205 Mont. 493, 668 P.2d 1063, 1064. In this regard, the standard for deciding facts is still the preponderance of evidence standard. *Cf., Pannoni v. Bd. of Trustees*, ¶73, 2004 MT 130, 321 Mont. 311, 90 P.3d 438, (Cotter, dissenting) (defining the preponderance standard as “more likely than not”).

Montana applies federal standards for establishing a *prima facie* case of discrimination in employment because of membership in a number of protected classes, including age or disability. The federal standards originally appeared in *McDonnell Douglas Corp. v. Green*, (1973), 411 US 792. Under those standards, Reinhardt had the initial burden to produce evidence (1) that he was a member of a protected class; (2) that he was qualified for the conductor trainee position; and (3) that he was discharged because he was a member of the protected class(es). *Tonack v. Montana Bank of Billings* (1993), 258 Mont. 247, 854 P.2d 326.

The *McDonnell Douglas* standards function as a means of “arranging the presentation of evidence,” allocating the burden of production and establishing the “order of the presentation of proof” in discrimination cases in which the evidence presented is circumstantial (“indirect”)<sup>5</sup> evidence. *Reeves v. Sanderson P. P., Inc.* (2000), 530 U.S. 133, 142, **quoted by** *Beaver v. D. N. R. C.*, ¶61, 2003 MT 287, 318 Mont. 35, 78 P.3d 857, **also citing** *Watson v. Fort Worth Bank & Trust* (1988), 487 U.S. 977, 986. The burden of production shifts back and forth between the parties in *McDonnell Douglas* indirect, or circumstantial, evidence cases. But the ultimate burden of persuasion rests with the charging party.

The *McDonnell Douglas* standards for shifting the burden of production are useful in discrimination cases because “‘employers are rarely so cooperative as to include a notation in the personnel files’ that their decisions were expressly forbidden by law.” *Ramseur v. Chase Manhattan Bank* (2nd Cir. 1989), 865 F.2d 460, **quoting** *Thornbough v. Columbus and Greenville R.R. Co.* (5th Cir. 1985), 760 F.2d 633,

---

<sup>5</sup> “Circumstantial evidence . . . ‘tends to establish a fact by proving another [fact]. . . which, though true, does not of itself conclusively establish [the fact at issue] but affords an inference or presumption of its existence.’ [Mont. Code Ann. §]26-1-102(1) . . . Ray’s claim before the Commission [of political belief discrimination] is based on circumstantial, or indirect, evidence.” *Ray v. Montana Tech*, ¶30, 2007 MT 21, 335 Mont. 367, 152 P.3d 122.

638. The absence of direct evidence of discrimination does not necessarily defeat a claim, but the production of circumstantial evidence establishing discrimination may ultimately fail to prove the claim. A fair method for evaluating the indirect evidence is essential. Montana, like many other jurisdictions, has adopted and adapted *McDonnell Douglas* as an appropriate and fair method for such evaluations.

[T]he shifting burdens of proof set forth in *McDonnell Douglas* were designed to assure that plaintiffs have their day in court “despite the unavailability of direct evidence.” [*T.W.A., Inc. v. Thurston* (1985), 469 U.S. 111, 121] . . . (emphasis added); *see also* *Martinez v. Yellowstone County Welfare Dep’t* (1981), 192 Mont. 42, 48, 626 P.2d 242, 245-46 (observing that one of the purposes of the *McDonnell Douglas* test is to ease the difficulty of bringing a claim of employment discrimination in the absence of direct evidence).

*Laudert v. Richland County Sher. Off.*, ¶22, 218 MT 2000, 301 Mont. 114, 125, 7 P.3d 386 (emphasis added in the *Laudert* opinion).

Reinhardt produced evidence at hearing sufficient to establish his prima facie case under *McDonnell Douglas*, but he argued that he had presented direct evidence of discrimination. Since the further analysis of the evidence differs depending upon which kind of evidence met his initial burden of proof, that question must first be addressed.

If Reinhardt presented direct evidence that BNSF’s consideration of illegal criteria (his age or his perceived disability) played a motivating role in its decision to discharge him, *McDonnell Douglas* is inapplicable whether or not the parties agree upon the reason for the adverse action. *Laudert*, ¶¶27-28, adopting and applying the plurality holding in *Price Waterhouse v. Hopkins* (1989), 490 U.S. 228, that direct evidence that an unlawful consideration played a motivating role in an employment decision is sufficient to support a finding of unlawful discrimination and that *McDonnell Douglas* does not govern the analysis.

Direct evidence is “proof which speaks directly to the issue, requiring no support by other evidence” and which proves a fact or facts without the need for an inference or a presumption. *Black’s Law Dictionary* 413 (5th Ed. 1979). When direct evidence proves illegal discrimination, the burden of persuasion (not just the burden of production) shifts to the respondent, to prove either that the direct evidence is not credible or that any illegal motive played no role in the action taken. *T.W.A.* *at* 121; *Carney v. Martin Luther King Homes, Inc.* (8th Cir. 1987), 824 F.2d 643, 648; *Fields v. Clark University* (1st Cir. 1987), 817 F.2d 931, 935; *Blalock v. M.T.I.* (6th Cir. 1985), 775 F.2d 703, 712.

Unless the respondent meets this burden with sufficient proof to discredit the

direct evidence or to demonstrate a legal justification for the adverse action, the charging party's direct evidence proves the illegal discrimination. *Blalock at* 707. Direct evidence can relate to the adverse action taken against the charging party or to the respondent's discriminatory intent in taking that action. *Foxman v. MIADS* (6/29/1992), HRC Case #8901003997; *Edwards v. Western Energy* (9/8/1990), HRC Case #AHpE86-2885; *Elliot v. Helena* (6/14/1989), HRC Case #8701003108.

On the face of the testimony, Reinhardt presented direct evidence sufficient to support a finding of illegal discrimination. For example, Human Resources Officer Mike Woodard wrote a memo to his supervisor on May 22, 2007, in which he reported that Kautzmann fired Reinhardt because he was medically unsuited for the job, was not catching on and was too old for the job. He also reported that Dassinger had acknowledged that Kautzmann told Reinhardt he was too old and was medically unsuited for the job.

The evidentiary record includes other evidence that the craft instructors and other union employees who reported problems with Reinhardt's performance expressly stated that it seemed he was "too old" and that he moved as if he might have "had a stroke." There is also testimony (in addition to Woodard's memo) that BNSF decision makers made the same kinds of comments about the decision to end his employment. This certainly seems to be direct evidence, far more solid than examples of "not direct evidence" discussed in *Price Waterhouse*.<sup>6</sup> However, taken in context, the remarks actually do not provide direct proof of a discriminatory intent, and therefore are not worthy of credence for that purpose.

People who observe the behavior of others often describe it with inferences of the motivation or causation for the behavior. Witnesses can give admissible testimony about their interpretation of observed behavior, because that is how human beings communicate their observations. Mont. R. Evid., Rule 701.

Just as our courts allow "lay opinion testimony" when the so-called opinion is a shorthand rendition of what the witness saw, fact finders can and must distinguish retaliatory animus that stems from stereotypical thinking from colloquial resort to stereotypes as shorthand renditions of what the witness saw. English is a colorful language, full of analogies and similes. For example, after watching an intoxicated person, a speaker might call the person "boiled as an owl" or "drunk as a sailor." Such comments might manifest the speaker's hostility toward owls or naval personnel. On the other hand, such comments often are simply shorthand efforts to

---

<sup>6</sup> Quoting Justice O'Connor concurring opinion in *Price Waterhouse*, the *Laudert* decision offered examples of what would not be "direct evidence" – "stray remarks in the workplace," "statements by nondecisionmakers," or "statements by decisionmakers unrelated to the decisional process." *Price Waterhouse*, 490 U.S. at 277, 109 S. Ct. at 1804-05. *Laudert at* ¶26

state what the speaker directly observed.

Analytically, testimony that states, “I saw him walking along the track and he was slow and unstable, like an old man,” resorts to a stereotype about age, to describe what the witness observed. Likewise, “the way he worked on the air hose, he was having as much trouble as a guy who has had a stroke,” generalizes about a medical condition to capture in graphic terms what the observer saw. Both statements, which are distillations of the testimony rather than actual quotations, suggest that the speaker believes that older males or stroke victims are at least likely to be incapable of doing certain things. Neither statement necessarily shows that the speaker lied about or misperceived about what he saw because he thought the person he was watching was an older male or might have had a stroke.

The comments about Reinhardt’s behavior at work are more likely than not shorthand efforts to state what the speaker directly observed, rather than evidence of discriminatory animus. In other words, the reports were attempts to describe Reinhardt’s difficulties in common vernacular. Therefore, the descriptions of Reinhardt’s difficulties in terms of age and a possible medical condition were not direct evidence of discrimination.

Since BNSF successfully established that Reinhardt’s evidence of illegal discrimination because of age or perceived disability was not credible as “direct” evidence, the Hearing Officer will proceed with application of the *McDonnell Douglas* standards to this case, resuming with the second level of that analysis because Reinhardt produced sufficient indirect evidence to make a prima facie case under *McDonnell Douglas*, raising a rebuttable presumption of discrimination.

To respond to that presumption, BNSF had the burden to produce evidence that “that [it] based [its] employment decision on a legitimate consideration, and not an illegitimate one.” *Furnco Construction Corp. v. Waters* (1978) 438 U.S. 567, 577.

BNSF offered concerns about Reinhardt’s ability safely and adequately to perform his job, based upon the observations and reports of the craft instructors and other union employees who worked with him. At this level of the analysis, the production of the evidence about those concerns did articulate a legitimate nondiscriminatory reason for its action.

Since BNSF produced evidence of a legitimate nondiscriminatory business reason for its action, the burden of production shifted back to Reinhardt to prove that the business reason was a pretext. Pretext may be established by direct evidence of discrimination, comparative evidence, or statistics. *Heiat at 793*. Reinhardt’s pretext evidence consisted, in essence, of the same evidence upon which he based his prima facie case: Woodard’s concerns about the propriety of his discharge, the use of stereotypical language by union and management BNSF employees to describe his

work performance, the “changing” justifications BNSF interposed for firing him, and the missing positive evaluations. He also argued that BNSF failed to undertake an individualized assessment of the actual risk of harm he posted, and that he and the next oldest trainee in the training group of which he was part both lost their jobs before the end of the training.

With all the evidence in, the ultimate burden of persuasion regarding his claims of illegal discrimination rested upon Reinhardt. He did not carry that ultimate burden and persuade the Hearing Officer that BNSF illegally discriminated against him.

Mike Woodard did not believe BNSF had documentation to “back up” the performance and safety concerns it advanced as the reasons for discharging Reinhardt, a legitimate concern for a Human Resources Officer. The substantial and credible evidence of record did show that instead of changing its reasons for firing him, BNSF was clarifying its reasons, explaining that it was the reports of Reinhardt’s difficulties in the field, not the terms used in those reports, that constituted its justification.

BNSF had notice of the observations and concerns of multiple experienced employees who had actually worked with Reinhardt. It had the right and duty to rely upon those observations and concerns, and to conclude that at least some of the time Reinhardt was not able safely to perform his duties as a conductor trainee.

Being unable safely to perform one’s duties at any time in a train yard or on a freight train out on the road is a serious matter. This probationary employee had passed his medical tests and had not reported any medical problems. He was, as far as BNSF knew, giving his best efforts to his work. Yet, he repeatedly left experienced workers with grave concerns about whether he could be trusted to do the job safely.

Under these facts and this testimony, the witnesses’ resort to stereotypical language to describe how Reinhardt walked and worked did not evidence hostility toward him because of his age or perceived condition. The repetition of those conclusory descriptive statements by management did not transform the basis for firing Reinhardt from a legitimate performance issue into discrimination based upon age or perceived disability.

The efforts by BNSF to point out that the conclusory statements were not evidence of illegal motives, but descriptions of actual performance problems were just that – explanations, not changing justifications.

BNSF satisfactorily explained the lost evaluations as a mistake rather than an attempt at concealment. In addition, throughout the case, BNSF acknowledged the number and the quality of those evaluations. Since BNSF did admit the existence and the contents of the missing evaluations, BNSF had no motive for withholding the evidence.

It is also an unlawful discriminatory practice to refuse employment to a person or to end their employment because of a physical disability, actual or perceived, when the demands of the employment do not require a distinction based on physical disability. *Reeves v. Dairy Queen, Inc.*, 1998 MT 287 Mont. 196, 953 P.2d 703. Making unilateral decisions about what is best for an employee regarded as disabled, despite the good intentions of the employer, is prohibited. *Reeves*, ¶135. If the employer fears that the disability endangers either that employee or others, the employer must engage in an interactive process with the employee regarded as disabled, to verify the seriousness of the perceived condition and independently assess the reality of the danger. *Reeves*, ¶142; Admin. R. Mont. 24.9.606(8).

Reinhardt ably argued that BNSF failed to engage him in this process. The problem with his argument is that he did not establish that BNSF regarded him as disabled. At age 25 as well as age 48, an inability safely to do the job, without any condition that the employer regarded as a disability, does not trigger the employer's duty of inquiry. Nobody actually regarded Reinhardt as having a disability, which is a necessary precursor to the duty of the employer to embark upon the independent evaluation. *See e.g.*, Admin. R. Mont. 24.9.606(7) (emphasis added):

If an employer defends an adverse employment action against a person with a physical or mental disability on the grounds that an accommodation would endanger the health or safety of a person, the employer's failure to independently assess whether the accommodation would create a reasonable probability of substantial harm will create a disputable presumption that the employer's justification is a pretext for determination for discrimination on the basis of disability.

Finally, it is true that Reinhardt and the next oldest trainee in his group were both let go during their probationary periods. This could suggest age discrimination. BNSF hired Reinhardt when he was 47. He had turned 48 when he was dismissed. BNSF had a great number of employees older than Reinhardt, including more than 200 engineers and conductors in the involved seniority district. Witnesses Clingingsmith, Koncilya and Score were all older than Reinhardt. The other trainee lost his job because he stopped showing up ("job abandonment"). On the facts in this record, the fates of Reinhardt and the next oldest trainee in his group did not establish discrimination because of age.

At the end of the day, it is impossible to say why Reinhardt appeared unable always to perform his job safely and adequately. Even his medical treatments and evaluations after his discharge did not define any condition causing his performance problems. All that is clear from the evidence is that Reinhardt's job performance, not his age or any suspected medical condition, was the reason that BNSF dismissed him.

## VI. CONCLUSIONS OF LAW

1. The Montana Department of Labor and Industry has jurisdiction over these charges of illegal discrimination. Mont. Code Ann. § 49-2-512(1).

2. BNSF Railway Company did not illegally discriminate in employment because of age or disability against Mitchell Reinhardt as alleged in his complaint. Mont. Code Ann. § 49-2-303.

**VII. ORDER**

1. Judgment issues in favor of respondent BNSF Railway Company and against charging party Mitchell Reinhardt on his charges of illegal discrimination in employment because of age or disability.

2. The Human Rights Act complaint of charging party Mitchell Reinhardt against respondent BNSF Railway Company is dismissed.

Dated: November 24, 2009.

/s/ TERRY SPEAR

Terry Spear, Hearing Officer

Montana Department of Labor and Industry

\* \* \* \* \*

**NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION**

To: Peter Michael Meloy, Meloy Law Firm, attorney for charging party Mitchell Reinhardt, and Michelle T. Friend, Hedger Friend, PLLC, attorney for respondent BNSF Railway Company:

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case.

**Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court.** Mont. Code Ann. § 49-2-505(3)(c).

**TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:**

Human Rights Commission, c/o Katherine Kountz

Human Rights Bureau, Department of Labor and Industry

P.O. Box 1728

Helena, Montana 59624-1728

You must serve **ALSO** your notice of appeal, and all subsequent filings, on all other parties of record.

**ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.**

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are **NOT** applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights

Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Hearings Bureau, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

**IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT**, include that request in your notice of appeal. The original transcript is in the contested case file.